IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-423

IN RE: Judge Allen M. Babineaux
Judge B. I. Berry
Judge Lucien C. Bertrand, Jr.
Judge Louis G. DeSonier, Jr.
Judge Edward N. Engolio
Judge John C. Morris
Judge Walter C. Peters

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA, OR IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA, OR IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Seven Louisiana Judges appeal from a decision of the Louisiana Supreme Court. This decision ordered that the petitioners be suspended without pay from their judicial offices for serving on the Board of Directors of financial institutions.

I.

OPINIONS BELOW

The decision of the Louisiana Supreme Court to which this Appeal, or in the alternative, Writ of Cer-

tiorari is addressed is reported in Volume 346 of the Southern Reporter, Second Series, pages 676 and following. A copy of this decision is attached as Appendix A.

II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(A) The decision appealed from is a disciplinary action brought against the appellants. These judges have been found guilty of violating Canon 5C(2) of the Louisiana Code of Judicial Conduct which provides in pertinent part that:

> "A judge may hold and manage investments, including real estate, and engage in other remunerative activity but should not serve as an officer, director, manager, or employee of any bank, lending institution, homestead or savings and loan association, insurance company, public utility and other business affected with a public interest." (See Appendix A)

Appellants contended that Canon 5C(2) is invalid because it is repugnant to the Fourteenth Amendment of the Constitution of the United States. The decision of the Supreme Court of Louisiana upheld the Canon.

(B) Appellants also challenge the process by which they were ultimately ordered to be suspended as being repugnant to the Fourteenth Amendment to the

Constitution of the United States. The decision of the Supreme Court of Louisiana upheld this process.

(C) Jurisdiction of this Appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(D) Should this Court decide that there is no direct appeal in this case, jurisdiction for granting the appellants a Writ of Certiorari is conferred by Title 28 of the United States Code, Section 1257(3).

III.

STATEMENT OF THE CASE

(A) Introduction

The appellants in this action are all duly-elected Louisiana Judges: Judge Allen M. Babineaux,[1] 15th Judicial District Court; Judge B. I. Berry, 5th Judicial District Court; Judge Lucien C. Bertrand, 15th Judicial District Court, Division D; Judge Louis G. DeSonier, Jr., 24th Judicial District Court, Division A; Judge Edward N. Engolio, 18th Judicial District Court, Division C; Judge John C. Morris, 5th Judicial District Court, Division B; Judge Walter C. Peters, 31st Judicial District Court. They are faced with suspension from their judicial offices because they have taken a stand contrary to Canon 5C(2), a provision of the Louisiana

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1 Judge Allen M. Babineaux resigned his board position following the Louisiana Supreme Court decision of May 16, 1977 (See Appendix A) and hence, is no longer a party to these proceedings.

Code of Judicial Conduct that was implemented after they assumed the bench.[2]

These judges challenge the constitutionality of the Canon 5C(2) prohibition. These judges also challenge the constitutionality of the judicial process which ultimately ordered their suspension.

At first glance, the case of these judges may appear to be easily dismissed as the gripings of a few members of "the old guard" who are stubbornly refusing to go along with the emerging wave of new judicial consciousness. Such a casual dismissal would be a grave mistake. These men recognize and applaud efforts for judicial accountability. However, careful consideration will reveal that the efforts directed against these judges have inherent constitutional flaws that cannot and should not be glossed over — no matter how popular the cause.

(B) Chronology

On March 5, 1975, the Louisiana Supreme Court promulgated the Code of Judicial Conduct that con-

2 Canon 5C(2) became effective January 1, 1976. The transcript of the testimony taken before the Judiciary Commission of Louisiana indicates the following:

Judge B. I. Berry became a director of a financial institution in 1949; he assumed the bench in 1971. (Tr. 42)

Judge Lucien C. Bertrand became a director of a financial institution in 1964; he assumed the bench in 1967. (Tr. p. 51)

Judge Louis G. DeSonier, Jr. became a director of a financial institution in 1962; he assumed the bench in 1971. (Tr. p. 62)

Judge Edward N. Engolio became a director of a financial institution in 1958; he assumed the bench in 1969. (Tr. p. 76)

Judge John C. Morris became a director of a financial institution in 1965; he assumed the bench in 1971. (Tr. pp. 82, 86)

Judge Walter C. Peters became a director of a financial institution in 1951; he assumed the bench in 1969. (Tr. p. 94)

tains Canon 5C(2), the subject of this dispute. (Appendix B)

The appellants, along with other Louisiana Judges, felt that Canon 5C(2) was unfair because, first, it exempted all part-time judges from its prohibition (who comprise nearly twenty-five percent of the State Judiciary Tr. 108) and second, the effect of the Canon was to find them guilty of judicial scandal without the need to prove any scandal at all. (See Appendix C) They brought their grievances to the disciplinary body of the Louisiana Courts, the Judiciary Commission. The Commission rejected the constitutional arguments saying that these were for the courts to decide.

The aggrieved judges then filed a declaratory judgment action in the Louisiana District Court to determine the constitutionality of the Canon. Before the District Court could hear the case, the Louisiana Supreme Court took the case out of the District Court and brought it directly to themselves in the Supreme Court. This extraordinary action was taken pursuant to their rarely exercised supervisory powers.

Now the Louisiana Supreme Court was in the tenuous position of first having promulgated this Canon and then having to decide if their promulgation was constitutionally proper. Thus, they were calling on themselves to assess the limits of their own power! Realizing this, the appellants requested that the six justices who had adopted the Canon recuse themselves in accordance with the Louisiana Civil Procedure Article that provides for recusation of a

Supreme Court justice.[3] The justices who had promulgated the Canon refused to recuse themselves from an adjudication of its constitutionality. Then perhaps not surprisingly, the justices went on to find the Canon they promulgated free of any constitutional infirmities. (Appendix C)

The appellants were then brought before the Judiciary Commission for violating the Canon. They all appeared and all admitted being in technical violation of the Canon. (Appendix D)

The Louisiana Supreme Court met again, turned aside the constitutional challenges of the appellants and ordered suspension for non-compliance. (Appendix A)

IV

QUESTIONS PRESENTED

1. Can the same governmental agency, in this case a Supreme Court, legislatively promulgate a rule, judicially decide the constitutionality of its own actions, and then executively enforce that rule?

2. Can judicial scandal be allowed to be presumed without a shred of supporting evidence and in the face of contrary evidence?

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3 LSA-C.C.P. Article 152 reads as follows:
A judge may recuse himself, whether a motion for his recusation has been filed by a party or not, in any cause in which a ground for recusation exists.

On the written application of a district judge, the Supreme Court may recuse him for any reason which it considers sufficient.

3. Can the Louisiana Supreme Court make rules regarding the appearance of justice that exempt over twenty-five percent of the affected judges on grounds wholly unrelated to the purpose of the rules?

V.

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

The Constitutional Provisions, Statutes, and Rules involved in this petition are the Fourteenth Amendment to the United States Constitution; 28 USCA 1257(2); 28 USCA 1257(3) and Canon 5C(2) of the Code of Judicial Conduct of the State of Louisiana (Appendix B)

VI.

REASONS FOR GRANTING APPEAL OR WRITS OF CERTIORARI

(A) Allowing the same governmental agency, in this case the Louisiana Supreme Court, to legislatively promulgate a rule, judicially interpret the constitutionality of the rule, and executively enforce that rule violates the basics of due process.

(B) Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property.

(C) A state may not treat similarly situated persons differently. Therefore, a rule that exempts a portion of the class from its scope, on grounds unrelated

to its purpose, violates the Equal Protection Guarantees of the United States Constitution.

A.

Allowing the same agency in this case the Louisiana Supreme Court to legislatively promulgate a rule, judicially interpret the reasonableness of the rule, and executively enforce that rule violates the basics of due process.

Lord Coke, in the most famous rubric of the law of disqualification said "aliquis non debet esse judex in propria causa," or "no man shall be a judge in his own case." 1 *Coke Institutes*, 141A

Six of the present seven Louisiana Supreme Court justices adopted the Canon in question in March of 1975. Because of their action, these six justices were named as defendants in the declaratory judgment action that began this case. The action was then removed from the District Court to the Supreme Court. These six justices refused to disqualify themselves from the action in which they were defendants and then decided that their promulgation of the Canon was reasonable and not at all constitutionally infirm. Subsequently, these six justices decided that the Canon was not being unconstitutionally applied by themselves to the appellants and enforced it against them.

Louisiana law specifically provides a method for recusal of Supreme Court Justices (see prior footnote). The Louisiana Supreme Court Justices refused to use this vehicle for substitution but went ahead and heard the whole case from beginning to end, themselves.

It is obvious that this action is not one that can be mechanically decided by appropriate precedent. The court's opinion covers eleven typewritten pages but cites only three cases. These are all questions of judgment. Full and fair judgment requires impartial judges. The appellants are all jurists, they know how the judicial mind functions, all they want is a fair hearing before an impartial panel.

Arbitrariness is one of the keystones of this case. To determine whether a rule or a policy or a practice is arbitrary demands analytical probing and sensitive weighing of competing interests with as much objectivity as possible. How can these six men, or any other six men, be expected to dispassionately weigh the arbitrary nature of their own actions?

The appellants made a decision in the beginning of this litigation not to attack the constitutionality of the Canon through the Federal Courts despite serious misgivings about the Louisiana Judicial climate. It was felt that a full adjudication on the District Court and Appellate Court level would allow full discussion of the issues. The Supreme Court, however, invoked their rarely used supervisory powers to deny any other courts the opportunity to review the action and decided it all themselves. There was no full, impartial discussion of the issues.

Our republic is founded on balance — power is not vested all in one branch of government, the states and the federal governments share some powers and complement each other in other areas. How can a person assess the limits of their own reasonableness? Such

action goes against the fundamental fairness that our constitution embodies.

Blackstone, in his *Commentaries*, spoke of the dangers of this very combination of powers in the judiciary when he said:

> "Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decision would then be regulated only by their own opinions and not by any fundamental principles of law, *Commentaries on the Law of England*, 259-60 (1765).

The founding fathers realized in creating a separation of powers that the powers of public officers should be defined by laws which they, as well as the people, are obliged to obey.

No man should be a judge in his own case. These judges should not be allowed to assess the constitutionality of their own actions. It is not fair. It is not right. It is not constitutional.

B.

Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property.

Canon 5C(2) was held to have applied to the appellants because sitting on a board of directors constituted "conduct prejudicial to the administration of justice that brings the judiciary into disrepute."

The appellants disputed the finding of disreputable or prejudicial conduct and requested any surveys, interviews or other evidence that could be used to demonstrate that this conduct brought the judiciary into disrepute. There was no such evidence.

The charges equated sitting on a board of directors with disreputable or scandalous conduct. But in their hearings the Judiciary Commissioner's Director testified that there had never ever been a complaint about these judges! (Tr. 111) *Not one complaint — yet they are being charged with scandal, with prejudice.* Someone must be scandalized in order to have scandal. Someone must be prejudiced in order to have prejudice. Here no one has been scandalized or prejudiced, yet sitting on a board of directors is equated with scandal and prejudice.

This lack of evidence, this presumption of scandal was challenged in the Louisiana Supreme Court — and no answer was ever forthcoming. This in effect, creates an unrebuttable presumption of guilt?

The due process clause of the Fourteenth Amendment sets limits on the power of a state to make proof of one fact (sitting on a board) evidence of the ultimate fact of the guilt (judicial scandal). *See Tot vs. United States*, 319 U.S. 463, 467 (1943) and *U.S. vs. Romano*, 382 U.S. 136, 139 (1965).

There must be a rational connection between the fact proven and the ultimate fact presumed. This is a criminal rule but it has been relied upon by this court in civil cases as well. See *Leary vs. U.S.*, 395 U.S. 6, 32-33 (1969).

Does sitting on a board of directors "bring the judiciary into disrepute" as claimed? The answer is unequivocally no.

Not one of these judges has ever been accused of misusing his office. Not one of these judges has been accused of any impropriety whatsoever. The only accusation is that they sat as a member of a board of directors.

Without more, the mere fact of sitting on a board of directors is not evidence of judicial impropriety or conduct that brings the judiciary into disrepute. To suspend someone from their duly elected office because of an unrebuttable presumption of guilt not supported by any facts is a grave and serious error. This error, this injustice should be remedied.

C.

A state may not treat similarly situated persons differently, therefore, a rule that exempts a portion of the class from its scope, on grounds unrelated to its purpose, violates the Equal Protection Guarantees of the United States Constitution.

Over twenty-five percent of the judges of Louisiana are not covered by Canon 5C(2). The purpose of Canon 5C(2) is to insure no one will bring the judiciary into disrepute; the end is the appearance of propriety. Seventy-seven judges are exempted because they are part-time judges and can use the money. (Tr. 108) The purpose of the rule is appearance of propriety, the exclusion is based on money. Differences in treatment

must accord to the end of the rule or else you are changing the rules in the middle of the game!

This Court requires, at a minimum, that a statutory classification bear some rational relationship to the legitimate state purpose. See *Weber vs. Aetna Casualty & Surety Company*, 406 U.S. 164, 172 (1972). The only real difference between full and part-time judges is salary but this difference is unrelated to the purpose of the Canon and thus cannot be the basis for a special classification. Is not impartiality just as important for those who make forty thousand a year as for those who make twenty-five?

The "public" who is to be protected by this Canon surely does not make a distinction between a full and part-time judge. The risks of conflict are the same, they are all judges, only the salary differs.

In fact, often part-time judges have more political influence than full-time judges. Under the circumstances, for the Canon to exclude part-time judges is hardly consonant with the search for judicial propriety.

In New Orleans, for example, you can easily get on the elevator in the Civil District Court building with two men who are judges. One gets off on floor number two, the other on number three. Both robe and hear motions in the morning, for lunch go to a board of director's brunch at Antoines. One faces suspension, the other does not. Does anyone think the "public" can tell the difference between the judge who is classified as part-time and the one who is classified as full-time so that they will see in one "judicial impropriety" and not in the other?

This classification does not bear a rational relationship to the purpose of the Canon and should be set aside.

VII.

CONCLUSION

There is a Rennaisance of morality sweeping our institutions in the wake of corruption in high places. It is impossible to disagree with the purpose or the motives of such action — it is laudable. But while no one can disagree with the ends, our citizens' rights must be protected in our choices of means.

No matter how the tide of public sentiment ebbs or flows — a true, lasting, and fair outcome will be based on the enduring constitutional principles of fairness, reasonableness and equality.

Our system is built on the pillars of fairness, reasonableness and equality. The well intentioned cannot achieve a better system by sacrificing the very principles that make the system great, or else the well-intentioned will end up like Sampson who in his blind zeal, destroyed the very pillars on which the temple vested.

The appearance of justice and fairness is important. But the attempt to bring about the appearance of justice and fairness must be conducted in a manner that is both fair and just. Otherwise the appearance of justice becomes more important than the reality.

We need not, indeed we must not, sacrifice constitutional means in order to achieve honorable ends.

The decision of the Louisiana Supreme Court to assess the limits of its own reasonableness has done just that. This Appeal, or in the alternative this Writ of Certiorari, should be accepted by this Court in order that the appearance of justice and the reality of justice may be once again reconciled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Writ of Certiorari has been served on:

William J. Guste, Jr.
Attorney General
State of Louisiana

This ____ day of September, 1977.

_____

JOHN P. NELSON, JR.

APPENDIX A

SUPREME COURT OF LOUISIANA

No. 59,562

IN RE JUDGE ALLEN M. BABINEAUX, FIFTEENTH JUDICIAL DISTRICT COURT, ET AL.

MONDAY, MAY 16, 1977

CALOGERO, Justice.

The Judiciary Commission of Louisiana, a constitutional body charged with initiating disciplinary action against judges for, among other things, willful misconduct relating to official duty and persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute, determined after preliminary investigation made on their own motion that respondent judges[1] had persisted in serving on the Boards of Directors of certain financial institutions or businesses affected with a public interest in violation of Canon 5 (C)(2) of the Code of Judicial Conduct, and notified the respondent judges that a hearing would be instituted to determine whether there was cause for disciplinary action as

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1 The respondent judges in this proceeding are the following: Judge Allen M. Babineaux of the Fifteenth Judicial District Court; Judge B. I. Berry of the Fifth Judicial District Court; Judge Lucien C. Bertrand, Jr. of the Fifteenth Judicial District Court; Judge Louis G. DeSonier, Jr. of the Twenty-fourth Judicial District Court; Judge Edward N. Engolio of the Eighteenth Judicial District Court; Judge John C. Morris, Jr. of the Fifth Judicial District Court; and Judge Walter C. Peters of the Thirty-first Judicial District Court.

provided by Article V, section 25 (C) of the Louisiana Constitution of 1974.

The judges filed an answer to the complaint in which they attacked Canon 5 (C)(2) on constitutional grounds. Independently, they filed a suit for declaratory judgment in the Civil District Court for the Parish of Orleans to have the canon declared unconstitutional. In that proceeding, on application of the Judiciary Commission of Louisiana, we granted writs to determine the constitutional question, 336 So.2d 318 (La. 1976), and in a decision of December 13, 1976, we declared Canon 5 (C)(2) of the Code of Judicial Conduct constitutional. Babineaux v. Judiciary Commission, 341 So.2d 396 (La. 1976) [hereinafter *Babineaux*].

In *Babineaux* we found nonmeritorious the judges' contention that their constitutional right of due process and equal protection as well as freedom of association were offended by the canon. In that decision we pretermitted the question of whether or not service as a director of a financial institution in violation of Canon 5 (C)(2) is *per se* proscribed conduct under Article V, section 25 (C) of the Louisiana Constitution of 1974. We concluded that this particular question was not then properly before the Court, because the Judiciary Commission which is vested with the initial responsibility of investigating judicial misconduct and, when justified, making appropriate recommendations to this Court for disciplinary action, had at that time made no finding and/or recommendation.

Subsequent to that decision, the Judiciary Commission held its hearing in the disciplinary matter, that

hearing having previously been stayed by us pending resolution of the declaratory judgment action. Each of the seven respondent judges testified at the hearing. Following the hearing, the Judiciary Commission took the matter under advisement and on February 5, 1977 the Commission found that each of respondent judges "has been and remains in open violation of Canon 5 (C)(2) of the Code of Judicial Conduct and that said violation *per se* constitutes persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute." The Commission's findings of fact and conclusions of law also stated that "each of respondents has been and is well aware of the existence of [the] Canon," that "the Louisiana Supreme Court recently upheld the constitutionality of the Canon and its applicability to respondent judges," that "[e]ach respondent has been given ample notice and ample opportunity to comply with the Canon" and has nonetheless "continued to violate the Canon." Additionally, it found each respondent judge guilty of willful misconduct. The Commission thereupon recommended that each of the respondent judges be suspended without salary until such time as he complies with Canon 5 (C)(2) by resigning his directorship or directorships on the financial institution on which he is currently serving. Under Article V, section 25 of the Louisiana Constitution, this Court must pass upon these recommendations and it is for this reason that the matter is presently before this Court.

The authority of the Supreme Court to discipline judges and the Judiciary Commission's power to recommend such measures is contained in Article V, section 25 (C) of the Louisiana Constitution of 1974 which provides:

"On recommendation of the judiciary commission, the supreme court may censure, suspend with or without salary, remove from office, or retire involuntarily a judge for *willful misconduct relating to his official duty*, willful and persistent failure to perform his duty, *persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute*, conduct while in office which would constitute a felony, or conviction of a felony. On recommendation of the judiciary commission, the supreme court may disqualify a judge from exercising any judicial function, without loss of salary, during pendency of proceedings in the supreme court. On recommendation of the judiciary commission, the supreme court may retire involuntarily a judge for disability that seriously interferes with the performance of his duties and that is or is likely to become permanent. The supreme court shall make rules implementing this Section and providing for confidentiality and privilege of commission proceedings." (emphasis added)

The provision has been implemented by Supreme Court Rule XXIII which grants to the Judiciary Commission the power to make investigations, hold hearings, and advise this Court whether it believes that a judge is guilty, among other things, of willful misconduct relating to his official duty, or persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Code of Judicial Conduct was adopted by the Court pursuant to its constitutional supervisory juris-

diction over all other courts, *see* La. Const. art. V, §5(A) (1974), and after lengthy deliberation on the need for greater specificity in some areas of ethical standards. For detailed historical development of the canon, *see Babineaux, supra*. at 399. This Code, like the Canons of Judicial Ethics which it replaced, is binding upon members of the judiciary. In re Haggerty, 257 La. 1, 241 So.2d 469 (1970). Canon 5 (C)(2) of the Code provides in pertinent part that:

> "a judge may hold and manage investments, including real estate, and engage in other remunerative activity but should not serve as an officer, director, manager, or employee of any bank, lending institution, homestead or savings and loan association, insurance company, public utility, and other businesses affected with a public interest."

The issue now before us is the merit of the recommendation of the Judiciary Commission that the seven respondent judges, who retain positions proscribed by Canon 5, be suspended without salary until they comply with the canon by resigning their directorships.

The respondent judges in these proceedings again contend that the canon violates the equal protection guarantees of the federal and state constitutions, that it violates substantive and procedural due process rights of the judges because it is an arbitrary and unreasonable exercise of state power, and that it violates the first amendment because it literally establishes guilt by association alone. They acknowledge that this Court has already passed on these constitutional challenges but submit that the assump-

tions that provided the basis for finding this canon to be a reasonable exercise of power are not substantiated by the facts presented at the Judiciary Commission hearing. They contend further that, even if the canon passes muster on the constitutional challenges, disobedience of it does not constitute "willful misconduct relating to his official duty" or "persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute" either as a *per se* rule or as applied on a case by case basis to each of them. They further contend that the fact that they have taken full exercise of their legal rights to challenge the canon, standing alone, cannot be considered a breach of either of the constitutional prohibitions because such a holding would exert a chilling effect on the free and full exercise of the right to challenge the rules.

The matters before us for present consideration therefore are limited. They are 1) whether we should reconsider, as requested by respondents, the constitutional issues already ruled upon adversely to the judges in the earlier decision, in light of the record which has been made up before the Judiciary Commission; 2) whether, assuming that Canon 5 (C)(2) is again held constitutional, their conduct in desisting from resigning their respective positions constitutes grounds under Article V, section 25 (C) of the Constitution for disciplinary action; and 3) assuming we reach the issue, whether and to what extent respondents should be disciplined.

Armed with the final judgment of this Court holding the canon constitutional, the Judiciary Commission at the hearing presented no evidence other than proof

that the respondent judges were persisting in violating the canon by remaining as directors on their respective boards. The judges, on the other hand, presented unopposed testimony supportive of their contention that there was no substantial conflict or risk of conflict between their duties as judges and as directors, that litigation in their respective courts by institutions on whose board they sat was rare or nonexistent, that they did not solicit business for the respective institutions, that they preferred not to be denied their freedom of association, and that resigning would constitute a financial hardship for them.

Respondents' first contention is that the rationale on which the Court found the canon constitutional was shown by them to be unfounded in their particular situations, and the canon is therefore unconstitutional as it is applied to them. We have found the restriction neither unreasonable nor arbitrary on its face because it serves to reduce the possibility that a judge would, or would seem to, use the prestige of his judicial office to attract business for the financial institution, to eliminate the potential conflict between a director's fiduciary duty to the corporation and his judicial duties, and to lessen the possibility of conflict of interest for the judge revolving around litigation before the court. The judges argue that they have overcome the presumption that the statute is unconstitutional as to them, because they have shown that none of the financial institutions involved gives its directors the responsibility of soliciting new accounts, that none have brought in any new accounts (other than family members), and that very seldom have any of these judges had to recuse themselves because of litigation in their court by their financial institutions. We find

that this showing does not overcome the presumption that the restriction is constitutional as it is applied to them.

Furthermore, our judgment in the declaratory judgment suit holding the canon constitutional is final. We will not in this litigation reconsider the issues decided there. Even were we inclined to do so, nothing presented by respondents convinces us that we erred in that original determination. This matter has already been resolved.

Respondents' second contention, that violation of Canon 5(C)(2), standing alone, does not fall within the conduct proscribed by Article V, section 25(C) warranting disciplinary sanctions upon recommendation of the Judiciary Commission, has not yet been answered by this Court because that question was pretermitted in the earlier opinion. The issue raised here is whether the retention of board membership on a named financial institution, in direct conflict with the canon of the Code of Judicial Conduct, constitutes either "willful misconduct relating to his official duty" or "persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute" so as to be a ground for discipline under the constitutional power of this Court. *See* La. Const. art. V, §25(C) quoted above. The Commission found that the respondents' retention of these proscribed positions, after this Court's recent judgment upholding the canon's constitutionality and despite ample opportunity to comply, constituted both willful misconduct and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

We essentially agree with the Commission's conclusion for the following reasons. This Court has the constitutional authority, power and duty under Article V, section 5(A) to supervise all the courts of this state, with the right to establish procedural and administrative rules not in conflict with law, and the right to adopt standards of ethical conduct for judges. We have exercised that authority by adopting the Code of Judicial Conduct effective January 1, 1976. Included in that Code of Judicial Conduct is the canon here at issue which prohibits judges serving as directors of banks, homesteads and other businesses affected with a public interest. We have determined that this canon, Canon 5(C)(2), is constitutional. The Code of Judicial Conduct is binding on members of the judiciary. In re Haggerty, *supra*. Respondent judges have violated the canon, albeit for reasons which in their judgment required them to do so.

We find it unnecessary to decide whether what they have done by continuing to serve and refusing to resign is willful misconduct relating to their official duties, because we are satisfied that their conduct falls within the other constitutional proscription relied upon by the Judiciary Commission, namely, that it is persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The conduct is undeniably persistent and, contrary to respondents' positions, it is also public. Even without the publicity attendant to this litigation, respondents' service on boards of directors of financial institutions (banks, homesteads, etc.) was and is open and cognizable to those members of the public, and the bar, with sufficient interest or inclination to want to know. In our view it is also prejudicial

to the administration of justice bringing the judicial office, and the judiciary in general, into disrepute, to have judges who are constitutionally subject to the supervision of this Court deliberately, continuously and openly refusing to comply with a valid canon of ethics.

Rules, including rules of judicial conduct, are made to be followed, not disregarded. There would have been little purpose in the adoption of the Code of Judicial Conduct if they were to be merely hortatory. As was stated by the Supreme Court of Oregon in In re Hannon, 214 Or. 51, 59, 324 P.2d 753, 756 (1958):

> "The rules promulgated by this court concerning professional and judicial ethics are not merely pious exhortations. They were established to be obeyed and they create rights corresponding to the duties imposed."

Judges are not merely elected public officials. Their role in the administration of justice makes them a special breed. The administration of justice requires adherence by the judiciary to the highest ideals of personal and official conduct. If judges openly flaunt the legal and constitutionally sanctioned and adopted Canons of the Code of Judicial Conduct, there is no question but that such persistent and public conduct is prejudicial to the administration of justice and that it does bring the judicial office into disrepute.

Having found that respondent judges' conduct constitutes grounds under Article V, section 25(C) of the 1974 Louisiana Constitution for disciplinary action, we need turn to the question of the extent to which respondents should be disciplined.

We are not unmindful of the fact that these respondent judges have violated the canon primarily in order to have their rights fully and finally tested in court. And we are aware of nothing in the backgrounds of these fine judges or in the manner in which they have conducted their respective offices except such as is exemplary. They are good judges who are being required to suffer personal and economic deprivation brought on by evolving concepts of ethical propriety. As we have already pointed out, serving as members of boards of directors of these institutions had been permitted until relatively recently.

It is therefore with a degree of reluctance but with a commitment to duty that we are constrained to take disciplinary action against the respondent judges. We do so purely and simply to enforce Canon 5(C)(2), a function which is our constitutional duty.

Article V, section 25(C) of the 1974 Louisiana Constitution, appropriate to this case, permits censure or suspension with or without salary. Censure we deem inappropriate at this time, because the judges were in apparent good faith belief that their refusal to abide by Canon 5(C)(2) did not amount to constitutional cause for disciplinary proceedings against them. We are unwilling to censure them for having chosen to defend their view of the constitution by the present proceedings. Nevertheless, (pretermitting whether censure or other disciplinary sanction, in addition to suspension from office without salary might be appropriate if respondents persist hereafter in violating the canon) in order to enforce our ruling, the discipline we now choose to impose is suspension from office without salary, subject to a grace period of thirty days from the

date of finality of this judgment. During such grace period they will have the opportunity to resign their positions as members of the board of directors of their respective financial institutions. If, at the expiration of that thirty day period, any of the respondents still have not complied with the canon, by resigning their board positions, they shall be suspended until such time as they do so.

For these reasons, the recommendation of the Judiciary Commission that the seven respondent judges be suspended without pay until they comply with Canon 5(C)(2) of the Code of Judicial Conduct is adopted. Such action, however, shall be suspended for thirty days from the date of finality of this judgment and then shall be imposed only on those judges who have not come into compliance by that date. Respondents are reserved the right to apply for a rehearing.

SUMMERS, Justice (concurring in part and dissenting in part).

While I agree with the reasons assigned for finding that the respondent judges have violated Canon 5(C)(2) of the Code of Judicial Conduct, I am of the opinion that they should not be suspended without pay until they comply. In my view censure is more appropriate.

APPENDIX B

SUPREME COURT OF LOUISIANA

ORDER

[Filed: March 5, 1975]

Pursuant to this court's supervisory jurisdiction over the courts of the state, the court adopts the following Code of Judicial Conduct provisions for the proper guidance and protection of the justices and judges of the courts of record of Louisiana, effective January 1, 1976, replacing the Canons of Judicial Ethics adopted October 13, 1960:

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective. As a necessary corollary, the judge must be protected in the exercise of his judicial independence.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) Except as permitted by law, a judge should not permit private or ex parte interviews, arguments or communications designed to influence his judicial action in any case, either civil or criminal. A judge should not accept in any case briefs, documents or written communications intended or calculated to influence his action unless the contents are promptly made known to all parties. Judges of appellate courts should also avoid all actions or language which might indicate to counsel, litigants or any member of the public, the particular member of the court to whom a case is allotted or assigned for any purpose. Similar circumspection should be exacted on the part of court officers, clerks and secretaries.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comments about a pending or impending proceeding in any court, and should re-

quire similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto at least during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record for the court or for counsel, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive or ceremonial proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. All appointments should be made on an impartial basis, with a view of selecting competent persons of good moral character. He should avoid appointments which tend to create suspicion of impropriety. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Recusation. The recusation of judges is governed by law.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to the public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the

economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a fund raising speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity but

should not serve as an officer, director, manager, or employee of any bank, lending institution, homestead or savings and loan association, insurance company, public utility, and other businesses affected with a public interest.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent recusation.

(4) A judge or a member of his family residing in his household should not accept any gifts or favors which might reasonably appear as designed to affect his judgment or influence his official conduct.

(5) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Arbitration. A judge should not act as an arbitrator or mediator.

E. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on

matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

A Judge Should Accept Compensation for Quasi-Judicial and Extra-Judicial Activities Only under Restricted Circumstances

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; nor should he misrepresent his identity, qualifications, present position, or other fact.

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a court of record performing judicial functions, including an officer such as a judge ad hoc, referee, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), 5D, and 5E;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), 5C(3), 5D, and 5E.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge is not governed by the provisions of this Code, except when he is sitting by assignment and then he shall be subject to the rules applicable to a judge *pro tempore*.

Committee on Judicial Ethics

To the end that these canons may be properly interpreted, and in order to provide a forum to receive inquiries from members of the judiciary related to the interpretation of these canons, the Supreme Court Committee on Judicial Ethics is hereby created. The function of this Committee shall be limited to the issuance of advisory opinions in response to inquiries from any judge insofar as these canons may affect him.

The Committee shall consist of nine members, as follows:

(a) The Chief Justice and one other member of the Supreme Court;

(b) The Chairman of the Conference of Court of Appeal Judges and one other Court of Appeal judge;

(c) The President of the District Judges Association and one other District Judge;

(d) The President of the City Judges Association;

(e) The Judicial Administrator; and

(f) The President of the Louisiana State Bar Association.

The members of said Committee shall be selected and appointed in the following manner and for the terms indicated:

(a) The Chief Justice of the Supreme Court shall always be a member and shall be chairman during his term of office as Chief Justice;

(b) The Supreme Court shall select an Associate Justice who shall serve for a term of two years;

(c) The Conference of Court of Appeal Judges shall select one member to serve on the Committee for two years;

(d) The District Judges Association shall select one member to serve on the Committee for two years;

(e) The Chairman of the Conference of Court of Appeal Judges, the President of the District Judges Association, the President of the City Judges Association, the Judicial Administrator, and the President of the Louisiana State Bar Association shall, ex officio, be members of the Committee and shall serve during their respective terms of office.

The Judicial Administrator shall be Secretary of the Committee. The Committee shall make its own rules and select members to serve in such other offices as it creates.

The Committee shall act upon all inquiries as promptly as the nature of the case requires.

Adopted by the court this 5th day of March, A.D., 1975, to become effective January 1, 1976.

New Orleans, Louisiana.

/s/ JOE W. SANDERS
Joe W. Sanders,
Chief Justice

/s/ FRANK W. SUMMERS
Frank W. Summers,
Associate Justice

/s/ MACK E. BARHAM
Mack E. Barham,
Associate Justice

/s/ ALBERT TATE, JR.
Albert Tate, Jr.,
Associate Justice

/s/ JOHN A. DIXON, JR.
John A. Dixon, Jr.,
Associate Justice

/s/ PASCAL F. CALOGERO, JR.
Pascal F. Calogero, Jr.,
Associate Justice

/s/ WALTER F. MARCUS, JR.
Walter F. Marcus, Jr.,
Associate Justice

APPENDIX C

SUPREME COURT OF LOUISIANA

JUDGE ALLEN M. BABINEAUX, ET AL

versus NO. 58,450

JUDICIARY COMMISSION OF LOUISIANA, ET AL

ON WRIT OF CERTIORARI TO THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

Monday, December 13, 1976

SANDERS, Chief Justice.

Ten Louisiana judges filed suit in the district court for a declaratory judgment that Canon 5C(2) of the Louisiana Code of Judicial Conduct (1975), prohibiting judges from serving on the board of directors of financial institutions, is unconstitutional. All but one of the judges presently hold positions on the board of directors of banks and other financial institutions. On application of the Judiciary Commission of Louisiana, alleging that the constitutionality of the canon was at issue, we granted writs to determine the constitutional question. La., 336 So.2d 218 (1976).

Canon 5C(1) and (2) of the Louisiana Code of Judicial Conduct (1975) provides:

> "(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.
>
> "(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity but should not serve as an officer, director, manager, or employee of any bank, lending institution, homestead or savings and loan association, insurance company, public utility, and other businesses affected with a public interest."

Specifically, the petitioners assert that Canon 5C(2) violates the due process clauses of the Fourteenth Amendment to the United States Constitution and of Article 1, Section 2 of the Louisiana Constitution (1974). Petitioners argue that the canon unduly restricts their right to pursue an occupation.

Petitioners also assert that the canon violates the Equal Protection clause of the Fourteenth Amendment in that it does not apply to part-time judges or to membership on the boards of directors of all types of businesses.

Finally, petitioners assert that the canon abridges their freedom of association in violation of the First Amendment to the United States Constitution.

The canon has its roots in the legal history of our State. On October 13, 1960, the Louisiana Supreme Court adopted for the first time canons of judicial

ethics "for the proper guidance and protection of the Justices and Judges of the courts of record of Louisiana." See 141 So.2d XXXI. The adoption of the canons climaxed a concerted effort of leaders of the bench and bar to secure formal guidance for judicial conduct. Canon IV provided generally that a judge's official conduct should be free from impropriety and the appearance of impropriety. More specifically, Canon XVIII provided:

> "A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power of prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not personally solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties."

On June 17, 1971, the Supreme Court Committee on Judicial Ethics formally ruled that membership on the board of directors of a bank violated Canons IV and XVIII of the Canons of Judicial Ethics.

On March 15, 1973, the Chief Justice appointed a 22-member committee, composed of leaders of the bench and bar, to prepare a new code of judicial conduct in

light of subsequent developments, including the publication of a new code of judicial conduct by the American Bar Association. After extensive deliberation, the committee recommended retention of the prohibition against service by judges on boards of financial institutions but recommended more specific language, that now contained in Canon 5C(2). The committee also recommended a grandfather clause, that is, a clause allowing judges already on the boards of financial institutions to continue to serve but barring new memberships.

On March 5, 1975, almost two years after the committee began its work, this Court adopted the Code of Judicial Conduct substantially as recommended, including Canon 5C, but rejected the grandfather clause. See 308 So.2d XXXIV.

Due Process

The petitioners first argue that Canon 5C(2) unduly restricts their right to pursue an occupation and thus violates their rights to liberty and property protected by the due process clauses of both the state and federal constitutions.

This argument addresses what is generally termed substantive due process. *Substantive due process* may be broadly defined as the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property. The essence of substantive due process is protection from arbitrary and unreasonable action. Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954); 16 Am.Jur.2d, Constitutional Law, § 550, p. 946.

The State Constitution vests in the Supreme Court of Louisiana general supervisory jurisdiction over all other courts, with authority to establish procedural and administrative rules not in conflict with law. Art. 7, § 10, Const. (1921); Art. 5, § 5, Const. (1974). Thus, the petitioners concede that the Supreme Court has general authority to adopt rules regulating the conduct of judges.

A director occupies a fiduciary relation to the corporation and its stockholders. LSA-R.S. 12:91; Williams v. Fredericks, 187 La. 987, 175 So. 642 (1937); Roussel Pump & Electric Co. v. Sanderson, La. App., 216 So.2d 650 (1968); House of Campbell v. Campbell, La. App., 172 So.2d 727 (1965). The directors manage the corporate affairs and are under a duty to use their best efforts to promote the interests of the corporation. LSA-R.S. 12:81, 19 C.J.S., Corporations, § 764, p. 112.

A judge in the exercise of his judicial duties occupies a unique position. The nature of his office imposes upon him restrictions with respect to the extent that he can engage in the varied activities of business life. 46 Am.Jur.2d, Judges, § 51, p. 128. Canon 5, as a whole, is designed to minimize the risk of conflict between a judge's extra-judicial activities and his judicial duties. Canon 5C(2) promotes this objective. A similar canon is in effect in a number of other states and in the federal courts. See Code of Judicial Conduct for United States Judges, Canon 5, 28 U.S.C. 455.

The risk of conflict is substantial. As a director, a judge may use or appear to use the power and prestige of his judicial office to attract business for the corporation. Although not intentionally exerted, his influence upon litigants and potential litigants defies measurement.

The petitioners' contention that a directorship is a neutral position is untenable. It overlooks the fact that a director owes a fiduciary duty to the corporation. In practical terms, this means a duty to efficiently manage its affairs and promote its business.

A second source of conflict is in litigation. Litigation by financial institutions is a common occurrence. The corporation may become a litigant in the court on which the judge-director serves or have a business relation with a litigant in that court. In either situation, problems arise pertaining to the recusal, or disqualification, of the judge. See LSA-C.C.P. Art. 151.

We conclude that the restriction on directorships is neither arbitrary nor unreasonable. Hence, it does no violence to substantive due process.

The petitioners also complain of the denial of procedural due process.

Procedural due process requires that all proceedings directed toward the deprivation of life, liberty, or property be conducted in a manner consistent with essential fairness. Among the requirements are notice of the proceeding and a fair opportunity to defend. Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); 16 Am.Jur.2d, Constitutional Law, § 548, p. 941.

On May 28, 1976, the Judiciary Commission notified the petitioners that under Louisiana Supreme Court Rule 23, the Commission would determine the applicability of Canon 5C(2) to them pursuant to an evidentiary hearing. The Judiciary Commission subsequently set the hearing for August 27, 1976. Because of the pendency of these proceedings, the hearing was delayed.

Petitioners make no attack upon the adequacy of the notice. They do complain of the inadequacy of the procedures, especially those for legal counsel, and assert that the Administrative Procedure Act (LSA-R.S. 49:951 et seq.) is applicable.

LSA-R.S. 49:951(2) expressly provides:

> " 'Agency' means each state board, commission, or department which makes rules, regulations, or policy, or formulates, or issues decisions or orders pursuant to, or as directed by, or in implementation of the constitution or laws of the United States or the constitution and statutes of Louisiana, *except the legislature or any branch, committee, or officer thereof and the courts.*" (Italics ours.)

The term *courts* in the above provision means the judicial branch of state government. See Art. 5, La. Const. 1974. The Judiciary Commission is an independent, disciplinary body in the judicial branch of government. See LSA-Const. Art. 5, § 25 (1974). Hence, contrary to petitioners' contention, the Administrative Procedure Act is inapplicable.

The Judiciary Commission procedures are set forth in Rule 23 of the Louisiana Supreme Court Rules. Section 9(a) provides:

> "In proceedings involving his discipline, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or for the production of books, papers, documents, and other evidentiary matter."

Insofar as representation by counsel is concerned, the above section contains no constitutional infirmity.

Equal Protection

The petitioners assert that Canon 5C(2) violates the Equal Protection Clause of the Fourteenth Amendment in that it makes two sets of classifications which are unreasonable. First, the canon applies only to full-time judges and not to part-time judges. Second, the canon prohibits judges from serving as directors of banks, lending institutions, homestead associations, insurance companies, public utilities, and other businesses affected with a public interest but does not prohibit service on the boards of other types of corporations.

The guiding principle of equal protection is that all persons similarly situated shall be treated alike. Lov-

ing v. Virginia, 388 U.S. 1, 18 L.Ed.2d 1010, 87 S.Ct. 1817 (1967); 16A C.J.S., Constitutional Law, § 502, p. 296.

As the petitioners correctly note, the key to determining whether there has been a denial of equal protection is whether the classifications made are unreasonable and arbitrary.

By virtue of constitutional and statutory authority, a substantial number of part-time judges are presently serving in the courts of limited jurisdiction. See LSA-Const. Art. 5, § 15 (1974); LSA-13:1951 et seq. These judges are legally authorized to pursue another occupation, and their compensation is fixed accordingly. Because of the dual source of their livelihood, their situation differs in a marked degree from that of the full-time judge of the courts of general and appellate jurisdiction. Under the circumstances, the separate classification of the part-time judge is neither unreasonable nor arbitrary. Reynolds v. Chumbley, 175 Tenn. 492, 135 S.W.2d 939 (1940).

The business classification of the canon is based upon the Code of Judicial Conduct of the American Bar Association adopted in 1972. That code contains alternative provisions: One, prohibiting a judge from serving as a director of any business; the other, prohibiting a judge from serving as a director of specified businesses affected with a public interest.

After consideration, the Supreme Court adopted the less restrictive of the two provisions. See E. W. Thode, Reporter's Notes to Code of Judicial Conduct (1973) pp. 80-83.

The question then becomes whether "bank, lending institution, homestead or savings and loan association, insurance company, public utility, and other businesses affected with a public interest" represents an unreasonable classification. We think not.

An analysis of the businesses enumerated discloses that they are of three types: (1) financial institutions, (2) public utilities, and (3) other businesses affected with a public interest.

Because of the nature of their operations, these three types of businesses are more likely to have regular litigation in the courts than other businesses. Mortgage foreclosures and suits on promissory notes by financial institutions are daily grist in the courts. Significantly, the courts ultimately review the rates of public utilities. Service on the boards of financial institutions, which compete for public patronage, is more likely to provide ground for a reasonable suspicion that a judge is utilizing the power and prestige of his office to influence others to patronize the business or contribute to its success.

We conclude that the business classification has a rational basis and is neither arbitrary nor unreasonable.

Freedom of Association

Petitioners' contention under the First Amendment is that the canon abridges their right to freely make economic associations.

The First Amendment, of course, is applicable to the states by virtue of the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937). However, freedom of association is not an absolute. Whenever the freedom of association is asserted against the exercise of state powers, it must be considered "in light of the special characteristics of the ... environment" in the particular case. See Tinker v. Des Moines Independent School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In such a case, a determination of the constitutionality of the regulatory measure requires a weighing of the competing interests. The State must demonstrate that the action taken is reasonably related to the protection of a legitimate interest and that the restriction on association is no greater than is required to further that interest. Healy v. James, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); 16 Am.Jur.2d, Constitutional Law, § 355, p. 682; Annot., Right of Association, 33 L.Ed.2d 865 (1973).

The contervailing state interest in the present case is the impartiality, independence, and public image of the judiciary. See Canon 1, Louisiana Code of Judicial Conduct; 308 So.2d XXXIV.

The state interest is correctly described in 46 Am. Jur.2d, Judges, § 51, p. 128 as follows:

> "The peculiar nature of his office imposes upon a judge certain restrictions and limitations with respect to the extent to which he may engage in the ordinary activities and associations of citizens. He should, of course, refrain from activities and associations that —

> would tend to impair his independence of judgment or render him subject to improper influence in the performance of his duties."

In 1948, Judge John J. Parker, United States Court of Appeals, Fourth Circuit, emphasized the importance of the regulatory interest here when he wrote:

> "The judge must not only be independent — absolutely free of all influence and control so that he can put into his judgments the honest, unfettered and unbiased judgment of his mind but he must be so freed of business, political and financial connections and obligations that the public will recognize that he is independent. It is of supreme importance, not only that justice be done, but that litigants before the court and the public generally understand that it is being done . . ." 20 Tenn.L.Rev. 703, 705-706 (1947-1949).

The state interest here is a compelling one. The restriction falls only upon those who freely accept the privilege of judicial office. As we have already observed, it is reasonably designed to further that interest.

In our opinion, the Canon does not unconstitutionally infringe upon the freedom of association.

Other Issues

One member of the Judiciary Commission asserts that the courts lack jurisdiction to decide the merits of any of petitioners' constitutional claims at this time.

Although his contention is substantial, we ultimately conclude that it is without merit. In our opinion, the courts do have jurisdiction in a declaratory judgment action to determine the constitutionality of the basic canon at this time. LSA-Const. (1974) Art. 1, § 22; LSA-C.C.P. Art. 1871.

The petitioners advance other contentions dealing with various aspects of the disciplinary investigation begun by the Judiciary Commission. Particularly, all parties request the Court to rule upon the question of whether or not service as a director of a financial institution in violation of Canon 5C(2) is *per se* proscribed conduct under Article 5, § 25(C) of the Louisiana Constitution (1974). These contentions are not properly before the Court. As a constitutionally created disciplinary body, the Judiciary Commission is vested with the initial responsibility of investigating judicial misconduct and, when justified, making appropriate recommendations to this Court for disciplinary action. This Court, of course, must pass upon these recommendations. See LSA-La. Const. (1974) Art. 5, § 25.

For the reasons assigned, Canon 5C(2) of the Louisiana Code of Judicial Conduct is declared constitutional, the demands of the petitioners are otherwise rejected at petitioners' costs, and the stay order previously issued is recalled.

APPENDIX D

JUDICIARY COMMISSION OF LOUISIANA

No. 0008
In Re: Judge Allen M. Babineaux

No. 0009
In Re: Judge B. I. Berry

No. 0010
In Re: Judge Lucien C. Bertrand, Jr.

No. 0011
In Re: Judge Louis G. DeSonier

No. 0012
In Re: Judge Edward N. Engolio

No. 0016
In Re: Judge John C. Morris, Jr.

No. 0017
In Re: Judge Walter C. Peters

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed: Mar. 23, 1977]

Canon 5C(2) of the Code of Judicial Conduct prohibits a judge from serving as an officer, director, manager, or employee of any bank, lending institution, homestead or savings and loan association, insurance company, public utility, and other businesses affected with a public interest. Each of the respondent judges, by his own admission, has been and is presently serving as a member of the board of directors of a financial institution such as is described in the Canon. Accordingly we find that each of the respondent judges has been and remains in open violation of Canon 5C(2) of the Code of Judicial Conduct and that said violation per se constitutes persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

We further find that each of the respondents has been and is well aware of the existence of Canon 5C(2). We particularly note that, in a suit brought by the respondents for a stay of these proceedings and for a declaratory judgment, the Louisiana Supreme Court

recently upheld the constitutionality of the Canon and its applicability to respondent judges and lifted the stay of these proceedings. Each of the respondents has been given ample notice and ample opportunity to comply with the Canon. Nevertheless, respondents continue to violate the Canon. Accordingly, we find each of the respondent judges guilty of willful misconduct.

RECOMMENDATION

Accordingly we recommend that each of the respondent judges be suspended without salary until such time as he complies with Canon 5C(2) by resigning his directorship or directorships on the financial institutions on which he has been and is currently serving.

Given under our hands, this 5th day of February, 1977.

/s/ JAMES H. DRURY
James H. Drury, Chairman
/s/ CLEVELAND C. BURTON
Cleveland C. Burton
/s/ CHARLES H. HECK
Charles H. Heck
/s/ JUDGE S. SANFORD LEVY
Judge S. Sanford Levy, Vice-Chairman
/s/ EDWARD W. STAGG
Edward W. Stagg
/s/ MONROE JACKSON RATHBONE, JR., M.D.
Monroe Jackson Rathbone, Jr., M.D.
/s/ JUDGE EARL E. VERON
Judge Earl E. Veron

I respectfully dissent from the findings of fact, conclusions of law and recommendation of the majority of the Commission.

See attached.

/s/ SIDNEY B. FLYNN
Sidney B. Flynn

Judge Paul B. Landry, Jr., recused himself from the entire proceedings.

DISSENT

I agree with the majority in findings of fact except that ample opportunity to comply has not been granted. The respondent judges were elected to their current term of office which commenced prior to the effective date of adoption of the revised Canons of Judicial Ethics. Application of the revised canons at a mid-term period will work a hardship on the respondent judges. While it is recognized that the judges could have chosen not to seek reelection, to have done so would have likewise worked a hardship in that abandonment of their judicial careers and rebuilding a private law practice takes time. An effective fair date to apply the whip of reform should be the completion of the current term of office.

Accordingly, I recommend that application of discipline be postponed until completion of the current term of office of the respondent judges.

/s/ SIDNEY B. FLYNN
Sidney B. Flynn